ATTORNEY-GENERAL HONG KONG

v.

LORRAIN ESME OSMAN & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ABU MANSOR ALI J
[ORIGINATING SUMMONS NO. R1-24-58 OF 1991]
20 MARCH 1992

LAND LAW: *Charge - Whether there must be disclosure against the defence.*

CONSTITUTIONAL LAW: *Courts - Powers of the Judge - Recording of the evidence.*

EVIDENCE: *Witnesses - Whether it be commenced only after refusal and study has been made of the "unused materials" - Whether it should be in open court or in camera.*

EVIDENCE: *"Unused materials" - Further discretions be given - Whether defence be given time to examine them before evidence be recorded.*

CIVIL PROCEDURE: *Ex parte order - Whether it can be varied under O. 66 of the Rules of the High Court 1980 - Whether respondent/applicant has locus standi to ask for the order prayed for.*

Counsel for Lorrain Esme Osman (1st respondent) made an application for "notice of motion" which arose out of an *ex parte* order made earlier on 25 September 1991.

Counsel for the 1st respondent contended that the *ex parte* order be set aside or alternatively be varied since the order for examination was obtained *ex parte* and because of the events set out below:

(a) that the order on 25 September 1991 being *ex parte* order be varied under O. 66 of the Rules of High Court 1980;

(b) that the power of the Judge in the recording of the evidence be more defined;

(c) that there must be disclosure of the charges against the defence;

(d) that as regards to the "unused materials" following the A.G.'s Guidelines, the defence be given time to examine them before evidence be recorded.

Held:

[1] Since by the terms of O. 39 rr. 5 to 10 and O. 39, rr. 11(1) to (3), the application has become *inter partes* the respondent Lorrain Esme Osman has *locus standi* to make this application for a variation.

[2] The power and functions of the Judge are derived from the applicable rules namely O. 39 rr. 5 to 10, 11(1), (3) and O. 66 r. 4(2), it is beyond dispute that the examining Judge has no power to rule on the admissibility or materiality of the evidence adduced before him. That is the function of the foreign trial Judge.

[3] On the question as to whether the Court should order the Hongkong government to supply the charges so as to facilitate and assist the Court in the course of the evidence gathering, based on the circumstances, it cannot. The process of evidence gathering cannot be looked at in isolation. Instead it must be regarded as the extension process that went on in London.

[4] As regards to the request to study the unused material, the Court held that the calling of the witnesses be proceeded on. If at the end of the examination-in-chief of the witnesses, it is indicated by Counsels for the respondents that they need to examine the documents, then Counsels for the applicant would have no objection.

[5] The benefit to be derived from an open hearing would far outweigh the prejudice to the respondents. Thus, the Court ordered an open Court hearing.

[Notice of motion dismissed.]

Legislation referred to:
Rules of the High Court 1980, O. 39 rr. 5 - 10, 11(1), (2), (3), O. 66 r. 4(2)

For the A.G. of Hong Kong - Clive Nicholls Q.C. (Graham Grant, C.K. Yeoh & Ira Biswas with him); M/s. Chooi & Co.
For the 1st respondent - Martin Thomas Q.C. (M. Anad Krishnan, Renu Zechariah with him); M/s. Anad & Associates
For the 3rd respondent - Graeme Hamilton (Teh Boon Eng with him); M/s. Teh & Associates

JUDGMENT

Abu Mansor Ali J:

The so-called notice of motion was made by Mr. Thomas Q.C. for Lorrain Esme Osman on 9 March 1992. As it arose out of an *ex-parte* order made by Y.A. Dato' Eusoff Chin on 25 September 1991 I treated it as chambers application, but for the convenience of parties I heard it in my Court, but still in chambers. Mr. Hamilton appeared for George Tan, another defendant and Mr. Nicholls Q.C. appeared for A.G. Hong Kong.

Mr. Thomas's application centred on the following matters:

(i) that the order 25 September 1991 being *ex-parte* order be varied under O. 66 of the Rules of the High Court 1980;

(ii) The powers of the Judge in the recording of the evidence be more defined;

(iii) That there must be disclosures of the charges against the defence;

(iv) that as regards the unused materials, following the Guidelines of the A.G. (A.G.'s Guidelines) supplied to them, in the form of 4 million computer print-outs, only in a matter of days before 16 March 1992, the defence be given time to examine these before the start of the recording of the evidence before me.

Mr. Thomas contended that since the order for examination was obtained *ex-parte* and because of the events set out, the applicant prayed as in P12 that order of 25 September 1991 be set aside or alternatively it be varied, to reflect the exact terms of the letter of request issued by the Supreme Court of Hong Kong on 4 September 1991 as follows and further directions be incorporated in that 25 September 1991 order in the following terms:

(a) that the persons mentioned herein attend before a Judge of the High Court of Malaya for examination and to produce any original documents, records, minutes and/or ledgers and such copies thereof as may be in their custody or control that are ancillary to the testimony to be given in the course of the said examination, at such time and place as you shall appoint before such person appointed by you as according to your procedure is competent to take the testimony of witnesses and require the production of documents **And That** you will require such witnesses to be examined *viva voce* touching the said

matters in question in the presence of the agents of the Attorney General of Hong Kong and representatives of Lorrain Esme Osman, Rais bin Saniman and George Tan Soon-Gin or such of them as shall, on due notice given, attend the examination;

(b) And it is further ordered that the agents of the Attorney General of Hong Kong or such of them as shall be present for the examination of such witnesses as may, after due notice in writing, be produced, and representatives of Lorrain Esme Osman, Rais bin Saniman and George Tan Soon-Gin or such of them as shall, on due notice, be present, to cross-examine the said witnesses, and the agents of the Attorney General of Hong Kong to re-examine the said witnesses;

(c) And it is also ordered that evidence of the said witnesses be reduced in writing and all documents and records relevant to the subject matter produced during such examination be duly marked for identification and authenticated by the seal of the High Court of Malaya be returned together with the notes of charges incurred in the execution of the examination of the witnesses through the British Council for transmission to the Supreme Court of Hong Kong;

(d) And it is also ordered that the Malaysian agents of the Attorney General of Hong Kong, M/s. Chooi & Co., Advocates & Solicitors of Penthouse, Bangunan Ming PH-01, Jalan Bukit Nanas, 50250 Kuala Lumpur be informed of the date and place where the examination is to be conducted.

(3) the following further directions be given in respect of this matter:

(a) that the applicant do give access to the 1st respondent of all the documents in their possession which qualify as "unused materials" in accordance with the Attorney General's Guidelines and to allow the 1st respondent to take copies of such documents which the 1st respondent deem necessary;

(b) that the applicant do provide the Court with a list of the charges which the applicant has decided to proceed as against the 1st respondent and a copy of such a list be served on the 1st respondent;

(c) that the time for the examination of witnesses be only commenced after sufficient time has been allowed for the 1st respondent to peruse and study all the "unused materials";

(d) that the powers of the presiding Judge who conducts the examination of the witnesses be agreed between the parties;

(4) the applicant do pay the 1st respondent the costs of this application; and

(5) for such other or further orders that this Honourable Court may deem fit to grant.

This matter was argued for 3½ days and a number of authorities were cited by both sides before me. I now give my judgment.

The first issue that I feel I need to dispose of is, whether the respondent/applicant Lorrain Esme Osman has *locus* to ask for the orders prayed for. Mr. Nicholls says he has not because O. 66 Rules of the Supreme Court that was used, to apply for a letter of request, speaks of the application being *ex-parte* and therefore when they came for the order of the Malaysian Court before The Hon. Dato' Eusoff Chin on 25 September 1991 that was also *ex-parte*. Mr. Thomas does not dispute this initial step of the A.G. but came to this gathering exercise and hearing of the evidence proper by the terms of O. 39 r. 5 to 10 and O. 39 r. 11(1) to (3) the application had become *inter-partes*.

I find that there is merit in the argument of Mr. Thomas and I rely on the case of *J. Barber & Sons v. Lloyd's Underwriters and Ors.* (R. 4 No. 24) where Evans J entertained an application for variation and ruled on the application for a variation that videotaping was unsuitable. Similarly I rule that the respondent Lorrain has *locus standi* here to make this application they are making.

This application of Lorrain as I understand it, brings into focus how this Court would treat this request from a foreign Court and how this examination of the witnesses fixed for 16 to 23 March 1992 is to be conducted, and what are the powers of the Judge in the conduct of this evidence gathering.

Fortunately for this Court this sort of matters had come before our Court. The Right Hon. Tan Sri Hamid CJ (as he then was) gave an order for the examination of witnesses following a letter of request for such order from Hong Kong. Then the Hon. Dato' Anuar J gave an order but it did not proceed to conclusion and finally on 25 September 1991 the Hon. Dato' Eusoff Chin J gave the present order and had the dates fixed. The Court here had given sympathetic treatment of the application following the said request and proceeded as expeditiously as possible.

In order that I will answer the notice of motion filed I find it is best that I consider the powers of the Judge, myself and then go on after that to consider whether the application merit granting the prayers asked for.

What powers and functions are in the hands of the Judge doing the examination must be derived from what rules apply. It was made clear in the cause of these arguments and I agree that this evidence gathering came under O. 66 r. 4(2) and that order applies O. 39 r. 5 to 10 and r. 11(1) to 11(3) for the examination of the witnesses pursuant to letters of request for the purpose of trial in a foreign jurisdiction.

In an examination of O. 39 and the above mentioned relevant rules it is beyond dispute that the examining Judge has no power to rule on the admissibility or materiality of the evidence adduced before him. That is the function of the foreign trial Judge. If there be objection taken to a question or if the witness objects to the question the examining Judge must reserve that for the foreign trial Judge's decision although he may set down his opinion in the matter. To this is added that the evidence taken is to be in the form of a deposition.

That being the sum of the powers of the Judge gathering this evidence I must then apply the restricted limited scope of that power to deal with this letter of request before me and at the same time deal with the applications made by applicant Lorrain herein.

I go to deal firstly with the alternative (2) in P12 where there is a request that the order of 25 September 1991 be varied to reflect the terms of the letter of request from Hong Kong (R. 6). When that order of Dato' Eusoff Chin dated 25 September 1991 (R. 7). ordered that examination be conducted by way of deposition and/or affidavit.

Mr. Thomas contended that the examining Court has all the powers to deal with the request and nothing in the Hong Kong's order which suggest any limitation.

Mr. Thomas also suggested the Court should adopt a sensible approach to be consonant with its duty to ensure that the procedure to be followed is fair to all parties.

Having considered parties submission on this point I cannot say that Mr. Thomas's position and what he wanted varied/amended is of very great significance. In its implementation in my view it may well come to that when this evidence gathering is in progress. The Court

must and will have regard to O. 39 r. 5-10 and r. 11(1) to (3) which has spelt out how that examination is to be conducted. I cannot see any difficulty. In its practical effect when a witness is called and he gives his evidence the terms of O. 39 are wide enough to accommodate what has been asked in para. 2 of the notice of motion P12. I feel that it is in everyone's interest that the Court should be free to interpret what has been laid out in O. 39. In this connection the Court intends to give parties all the latitudes to conduct their business. In the event I make no order under this item.

Now I come to prayer 3(a) where Mr. Lorrain is asking for further directions in the matter of "unused materials". As has been stated by Mr. Thomas there is progress and he produced before us the latest letter from Mr. Clifford Chance dated 18 March 1992 (P14) giving access to all unused materials and the way how inspection and copies are to be made. I have no doubt that problem will solve themselves. It may be that, subject to instructions, as Mr. Thomas has cautiously put it, in the end there might even be agreement on both sides on what witnesses may be regarded as non-contentious after the inspection of the "unused materials" to which access is now possible. In answering this question here I also answer prayer 3(d) that I feel and direct that it is not in the interest of the parties that the powers of the Judge be agreed to between the parties in the face of the clear provision of O. 39 r. 5-10 and rr. 11(1) to 11(3). It is best that the hand of the examiner be not tied to deal with this examination.

As regards the prayer 3(b) that the applicant be provided with the charges it is noted that the defence, from very early stage, has asked that the charges against Lorrain be given. This stand is still maintained. Mr. Thomas contended that the supply of this charges is necessary to know what is or are being alleged against Lorrain to facilitate and assist the Court in the course of this evidence gathering.

Mr. Nicholls's argument was Lorrain is still in London and waiting for extradition by the Secretary of State. Until such time as he is returned to Hong Kong there is no knowing what charge or charges he is returned to face. Since that is the situation the absence of the charges should not stop this evidence gathering exercise now.

The question for the Court here is should it order the Hong Kong Government to supply the charges? I find merit in the argument, that in the circumstances, it cannot.

I have to consider whether this denial will prejudice Mr. Lorrain in this evidence gathering exercise and could we proceed to do so?

I am of the view that we cannot look at this evidence gathering, to be done here, in isolation. It must be regarded as the extension of the extradition process that went on in London.

We consider that the words used were that the charges and the evidence in the extradition proceedings in London were examined in the "microscopic details" involving 30,000 pages of documents in a hearing time frame of 66 days, 19 days of which were spent in arguments. Because of this time spent, with the assistance of very experienced, able leading Counsel like Mr. Thomas and Mr. Nicholls and the rest of the instructing solicitors I do not entertain the slightest doubt in my mind and it must be true that, as described by His Lordship in the Divisional Court, Lorrain and their advisers must know the ambit of the charges. That being the case I find that the effect of my not ordering the charges to be supplied can be said to be minimal or none at all. I therefore refuse this prayer.

Lastly I come to the question of whether this examination of the witnesses, be only commenced after sufficient time has been allowed to Mr. Lorrain's Counsel and advisers to peruse and study all the "unused materials". I have the suggestion of Mr. Nicholls that the

calling of the witnesses be proceeded on with as normally as we can and if, at the end of the examination-in-chief of the witnesses, it is indicated by Mr. Thomas or Mr. Hamilton that they have to reserve cross-examination because they need to examine the documents, then he would have no objection. I am satisfied that this is the answer to this prayer and I make no order here.

For reasons given above, I therefore dismiss this notice of motion and I proceed with the evidence gathering today.

The last matter I wish to deal, in consequence of my dismissing this motion, is whether the examination of the witnesses should be in open Court or in camera. Apart from the authorities cited before me that I have a discretion that it is to be judicially exercised and the instances of proceeding in camera has definitely been confined to cases where in the interest of justice, for instance, where identity of minors may not be disclosed, I cannot find any suitable reason why this proceeding, this evidence gathering, should be in camera. I agree with Mr. Thomas the benefit to be derived from an open hearing would far outweigh the prejudice to his client. I accordingly order an open Court hearing.

As for costs of this application it is subject to agreement of the parties or each is at liberty to apply at the end of the proceeding.

Also found [1992] 2 CLJ 1282